SUPREME COURT OF THE UNITED STATES

October Term, 1894.

No. 1055.

NEW ORLEANS WATER-WORKS CO., Plaintiff in Error,

vs.

THE STATE OF LOUISIANA ex rel.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

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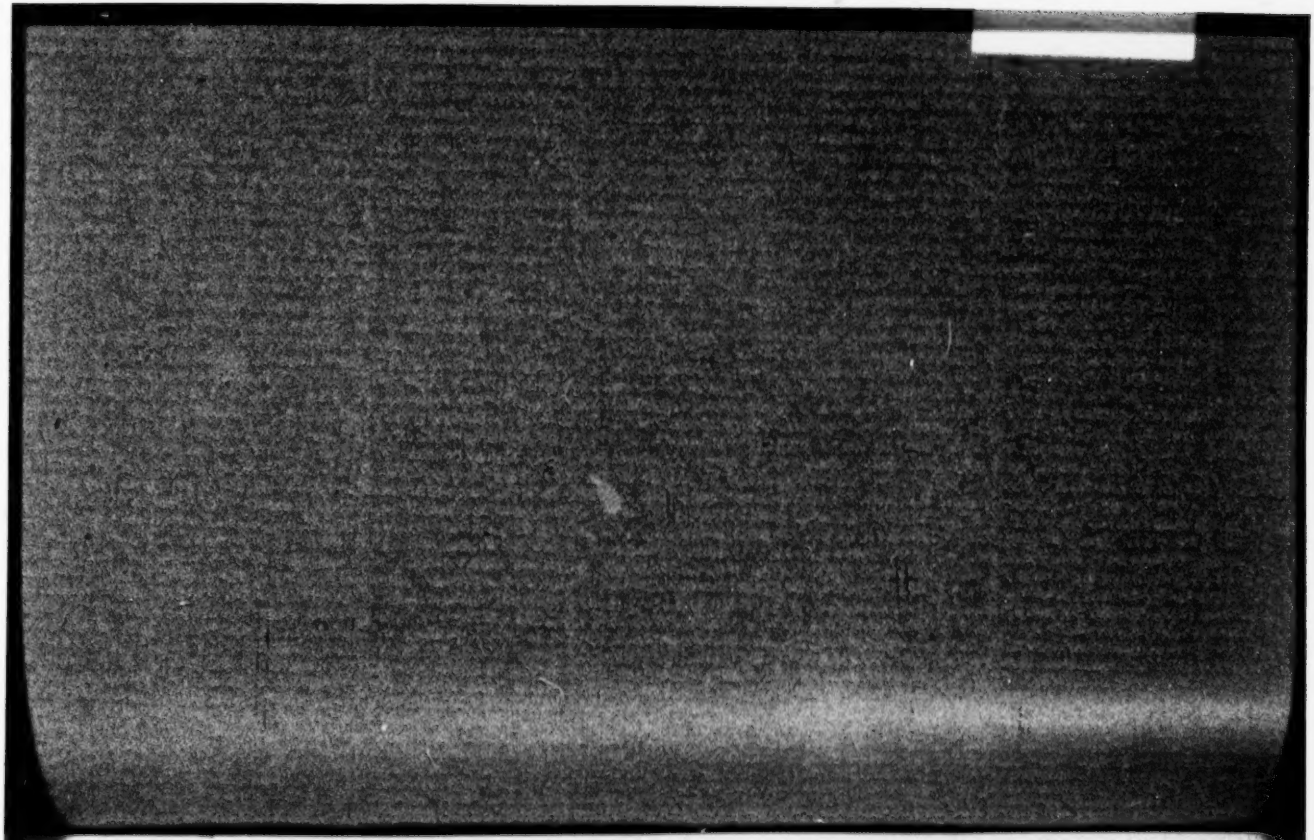

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 590.

NEW ORLEANS WATERWORKS CO., PLAINTIFF IN ERROR,

versus

THE STATE OF LOUISIANA ET ALS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

We have deemed it advisable to present this supplemental brief, which presents in a compact form some of the main propositions on which we rely to maintain the jurisdiction of this Honorable Court.

I.

The various Acts of the Legislature constituting the charter of the Waterworks Company were a mere device to sell the Waterworks back to the original owners thereof upon substantially the terms of the charter of the Commercial Bank and such other terms which the latter would accept, and were nothing more nor less than a commercial

contract between the State and the City on the one side, and the holders of the Waterworks Bonds and other creditors of the City on the other, whereby the former sold to the latter certain property and franchises for a named price payable in the valid interest bearing obligations of the City.

This proposition is set forth in detail in the defendant's answer.

Its truth is a matter of public history in Louisiana.

Its truth is demonstrated on the face of this record.

Under the charter of the Commercial Bank, of April 1st, 1833, that Company had **"forever** the exclusive privilege of supplying the City and inhabitants of New Orleans and its faubourgs with water from the Mississippi River, etc." (See Appendix, page x).

It had the right to regulate the price to be paid for water, subject to the conditions that for the first five years the profits should not exceed fifteen per cent., and thereafter ten per cent., that the City Council should have the right, through a Committee, to examine the corporation's books, and that such council should have power to reduce the price of water in such a manner and in such a proportion that the profits should never exceed the above mentioned rates (App. pp. xii and xiii).

The City of New Orleans was given the right to subscribe to $500,000.00 of the capital stock of the Bank, and if she did, she was allowed to name two of her officers directors in the Bank. (App. p. xiii).

The City was not allowed to vote on this stock for the other directors. (*Ib.*)

The dividends on this City stock were to be applied: 1st. To the interest on the bonds issued by the City to the

Bank for the purchase of the stock; and 2nd. To constitute a sinking fund to pay the principal of the bonds. (*Ib.*)

The City was authorized at any time after 35 years to buy the Waterworks constructed by the Bank, at an appraised value (App. p. xi).

The City exercised this right on January 19th, 1869, the Waterworks being valued at $2,000,000.

She paid this price by receiving a credit of $606,600.00, the value of her stock and sinking fund, and by issuing her 30-year five per cent. bonds for $1,393,400.00.

In 1877 the City found herself in a desperate situation. Her experiment with municipal ownership had proved a disastrous failure. The Waterworks were a source of loss and not of profit. They were administered by politicians and for politicians and not for the people. Rates were unequal and were fixed by favoritism. Many got water and did not pay. The collection of water rates was irregular and precarious. The plant had deteriorated into a junk pile. Her treasury was empty. She had defaulted on the payment of the interest on her public debt in 1875, and the premium bond plan, adopted in 1876, to fund her public debt, had not been accepted by the majority of her creditors. As a consequence of this default the holders of the Waterworks bonds had sought to annul the sale of the property and to appoint a receiver. See Sala vs. City of New Orleans, 2nd Woods, p. 188.

Another suit was pending in the United States Circuit Court in which a vendor's privilege was sought to be established in favor of such bondholders on the Waterworks.

In this juncture of affairs the City promoted and had passed Act No. 33 of 1877.

Its plain object and purpose was to produce a *restitutio in integrum.*

The stock was fixed at $2,000,000, the price paid by the City to the Commercial Bank.

The City was given stock for the $606,600.00 she had received credit for in the previous sale, and for such additional amounts as represented the par value of Waterworks bonds taken up and extinguished by the City. (Considerable sums of these bonds had been funded into the Premium Bond scheme).

The balance of the stock was reserved for exchange at par for outstanding Waterworks bonds, and for that purpose was all issued to the City.

The City had no power to organize the Company, or to carry out the scheme until and unless the holders of $500,000.00 of such bonds should exchange them for stock.

The powers granted the Company were those acquired by the City from the Commercial Bank, with a monopoly of supplying water to the City and its inhabitants for fifty years.

But that act contained certain onerous conditions not contained in the charter of the Commercial Bank, to-wit:

1st. The City was not only represented on the Board permanently by three officials, but she could vote her stock for the election of the other directors.

2nd. There was an onerous obligation to extend the works and pipes all over the City and to construct a new and extensive water system.

3rd. Construction of these new works and pipes must

commence within six months from the date of the Act of 1877.

4th. The Company was not to have possession and control of the existing works, which remained in the City Council, until other works were constructed by which the existing works might be dispensed with.

5th. No dividends could be declared until the contemplated new works were completed and in use.

The result was the bondholders would not accept the act before all these objectionable features were removed.

Thereupon, at the next session of the Legislature, Act 43 of 1878 was passed, whereby the City was deprived of her right to vote her stock, whereby dividends could be paid without reference to the completion or use of any contemplated new works, whereby immediate custody of the existing works was delivered to the Company, whereby the commencement of construction of new works or pipes was fixed at six months from date of organization of the Company, and whereby "the full, complete and adequate supply of water referred to in Section 13 of said Act No. 33 shall be so construed as to require a supply of water at the height of not less than fifteen (15) feet from the ground wherever the pipes of the waterworks now exist."

As these clauses put the property in the hands of the Company under the same obligations as those resting in the Commercial Bank, freed from the obligation of an enormous expenditure of money for which no provision was made except by mortgage for an inadequate sum, $2,000,000, on the property and its franchises, the requisite number of bondholders accepted this act, and the City of New Orleans and the bondholders proceeded to organize the Company.

The City thereupon disposed of all of her stock to the Waterworks bondholders and her other creditors, except 3937 shares which passed under the control of the Board of Liquidation of the City Debt, who now hold the same for the use and benefit of the City's creditors.

A comparison of these Acts of 1833, 1877 and 1878, and the transfer of the Waterworks from the old Company to the City and from the City to the new Company through the intervention of the Legislature, must, we think, lead any candid mind to admit the truth of the proposition stated at the head of this paragraph.

II.

Such being the character of the transaction, any violation by such purchasers of the conditions of their contract of bargain and sale through their control of the corporation they were given possession of, was a matter to be regulated by the general law of the State then in force on the subject of commutative contracts.

This proposition follows as a necessary corollary from the other.

The State and her creature, the City of New Orleans, when contracting with individuals in the domain of property and things of commerce, are bound by the same rules as any two individuals are bound by. Their contracts are to be interpreted by the same rules, and they have for their violation the same and only the same remedies that others may have who are similarly situated.

III.

If, therefore, the Waterworks Company, controlled by these contracting purchasers, or their assigns, charged more

for water than they had a right to charge, the State and the City had, under the law of Louisiana then in force, and in force when the contract was made, the following remedies at their option.

1st. An action in damages.

2nd. An action for specific performance.

3rd. An action for a dissolution of the contract.

4th. An action to restrain the things covenanted not to be done.

The above are the clear provisions of Arts. 1926, 1927, 1928 and 1929 of the Revised Civil Code of Louisiana adopted in 1870. They are quoted in full in the Appendix to the original brief.

IV.

If the State and City should choose the action to dissolve the contract, the necessary effect of such dissolution was to unweave the whole contract, and not to strike out one clause of it.

Such is the effect of the dissolving condition which is implied in all commutative contracts.

See Civil Code 1870, Arts. 2045, 2046, 2047 (App. pp. xxxiv).

The effect of such condition is to put each party to the contract in the position he held before the contract was made. C. C. Art. 2045.

A complete *restitutio in integrum* takes place, and if this cannot be done the action of dissolution falls. Leflore vs. Carson, 7 An. 65; Bryant vs. Stothart, 46 An. 489; Ware vs. Berlin, 43 An. 537.

If the party suing for the dissolution has received any

part of the consideration, he must tender it back as a condition precedent of his right to dissolve. Pugh vs. Canty, 33 An. 792; Gorham vs. Hayden, 6 Rob. 450; Latham vs. Hickey, 21 An. 425; Jones vs. Sidle, 5 Rob. 65; Bryant vs. Stothart, 46 An. 490.

V.

Therefore, the joint action of the executive, legislative and judicial power of the State of Louisiana, as disclosed in this record, in taking away the charter of the Waterworks Company for an alleged violation of the conditions on which the holders of its stock purchased the property and franchises, leaving such stockholders the owners of a lot of pumps, pipes and apparatus which they are prohibited from using, and which are therefore valueless except to sell as second-hand material, while the City of New Orleans retains the value she received therefor, to-wit., $1,616,300.00, is both a violation of the obligations of the contract between the parties, and deprives the Waterworks Company of its property without due process of law.

The only way this contract could be lawfully set aside and dissolved because the Waterworks Company charged too much for water was for the State to take back her charter, City to take back her property, with its rents and revenues, less the improvements thereon, and to pay the purchasers of the Waterworks stock the amounts received by her from them with the interest which the surrendered securities bore. But to compel the stockholders of the Water Company to keep a lot of pipes stretched over miles of City streets, without the right to use them, and even probably under the obligation to take them up, to reduce

its engines, pumps, boilers and hydrants to the condition of second-hand machinery, to put out its fires, discharge its employees, and thus strike dead one of the great municipal necessities of the City of New Orleans, while the State takes back its charter, and the City keeps its securities and frees herself from an enormous interest bearing debt to the payment of which her taxing power was pledged, is to eviscerate the contract between the parties, to confiscate the property of one party to that contract by the application of a rule of law, specially made for the case, which does not conform to the law of the land.

If the joint resolution of the Legislature authorizing the Attorney General to bring this suit, and the ordinance of the City Council ordering the City Attorney to join the State herein, can be construed to be the source and origin of this rule, violative of the law of the contract, which is the law of the land, then they are laws which impair the obligation of the contract, and are void.

If this result is the outcome of the joint action of the Legislature, the Attorney General and the Supreme Court of Louisiana, or of the separate action of any one of them, then the State of Louisiana has deprived the Waterworks Company of its property without due process of law.

These questions lay across the threshold of this action.

There was no way to avoid them except by ignoring them.

The decision of the Supreme Court of Louisiana apparently marches over and through them as if they did not exist, although they were exhibited on the pleadings, and were strenuously argued orally and by brief, and were again formulated and pressed in the application for a rehearing.

VII.

The interpretation placed upon Section 15 of Act No. 33 of 1877, by the Supreme Court of Louisiana, at the request of the State, acting through the joint resolution of the Legislature and the Attorney General, was a violation of the obligation of the contract between the State, the City and the Waterworks Company, and also a depriving the Waterworks Company of its property without due process of law.

That Section reads as follows:

"SEC. 15. *Be it further enacted, etc.*, That said Waterworks Company shall have the right to fix the rates of charges for water; *provided*, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish sworn annual statements of its business and condition; and that the City Council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said company and make such extracts from the same as they may be necessary, and in case the said profit shall exceed ten per cent., the City Council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; *and provided, further*, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus."

The clear meaning of this clause is:

1st. That the Water Company had the right to fix the rates, which right involved a certain degree of discretion, and which rates when so fixed were *prima facie* correct;

2d. That this discretion, however, was subject to two limitations: (*a*) that such rates should not be fixed at such a figure as to make the profits of the Company exceed ten

per cent.; (*b*) that such rates should not exceed those then charged by the City of New Orleans;

3rd. That, in order to compel a compliance with these two limitations on the power and discretion of the Water Company, a visitatorial power was given to the City Council of New Orleans, and the right to compel by a writ of mandamus the Water Company to adjust its rates to comply with these limitations;

4th. That the remedy provided in the Act to restrain and regulate the rates by mandamus instituted by the City Council was exclusive, that neither the State nor any private individual had the right to contest such rates, and that such rates were to stand and be considered as lawful until adjudged to be unlawful by the City Council, followed by either a voluntary or a judicially enforced compliance.

If this view of Section 15 prevails, then the action of the State to forfeit for overcharge, when there never has been any complaint of rates by the City Council, nor any finding by that Council that the rates were excessive, nor any mandamus proceeding to reduce rates, is in direct violation of the agreed remedy provided in the contract.

The rights and duties imposed in the charter on the Company are legislatively imposed.

No penalties or fines are imposed in the act for a violation of those duties by the Company.

No right is given to anybody, either State or water consumer, to contest or regulate those rates; on the contrary, this function is absolutely delegated to the City Council of the City of New Orleans, one of the parties to this contract.

In the absence of this delegation of authority, and in the absence of a right given by grant, or by clear implica-

tion, to the private water consumer to interfere, the State alone, through the Attorney General, would have had the right of action to enforce compliance with the statutory duty.

But the State surrendered this right to the local sovereign, the City Council, who were one of the parties to the act. Action by the Council to regulate and restrain the legislative grant to fix rates within the two conditions named, coupled with the right in the Council to compel obedience to its lawful mandates by the judicial power through a writ of mandamus, was a material part of the compact between the contracting parties.

This special statute providing this special remedy took the matter out of the purview of any general law, and placed the remedy in the hands of the courts who could enforce their writ of mandamus by fine and imprisonment of the officers of the Company and by sequestration of the revenues of the Company.

Non constat that the bondholders of the City would have accepted this charter if they had to have a lawsuit with every private consumer before they could collect a water rate, or if they subjected themselves to a penalty of forfeiture by making a mistake as to their rights or an error as to what was meant by the rates then charged by the City. Indeed, we think we may confidently assert they would not have accepted.

To support the legal proposition above laid down, that the remedy provided in this contract for controlling rates is exclusive, we refer the Court to the cases of Atkinson vs. The Newcastle & Gateshead Waterworks Co., Ex. Div.

(1877) p. 441, and of Johnson et al. vs. Consumers Gas Co. of Toronto (1898), A. C. p. 447.

The first was an action by a private individual against a waterworks company, chartered by act of Parliament to furnish water to the City of Newcastle, for damages for a breach of its statutory duties imposed in its charter, and the court held that no such action would lie, as the act provided special penalties for breaches of certain duties and none for breaches of the other duties.

In his opinion, Lord Chancellor Cairns, after expressing grave doubts whether the authorities quoted by Lord Campbell, in Couch vs. Steel, justified the broad general proposition there laid down, that whenever a statutory duty is created any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed, continued:

"I cannot but think that that must to a great extent depend on the purview of the Legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the Court have to deal *is not an act of public and general policy but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.*"

In the same case, Cockburn, C. J., after concurring with the Lord Chancellor in what he said about Couch vs. Steel, said:

"The act of Parliament on which that case turned was a public general act applicable to all the Queen's subjects: here we are dealing with certain obligations imposed by the legislature upon a private company as the conditions upon which Parliament granted them the powers under

which they carried out their undertaking; and I think that such an act of Parliament *is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm.* I entirely agree with the Lord Chancellor in the conclusion at which he has arrived, that the particular act which we have now before us does not by implication give to persons who may be injured by the breach of the duties thereby imposed, *any remedy over and above those which it gives in express terms.* If therefore any person is injured by a breach of such duty, he must have recourse to the statutory remedy, and cannot maintain an action for damages."

The second case was an action to compel the Consumers Gas Company of Toronto, chartered by legislative act, to refund alleged overcharges for gas and to compel it to fulfil certain statutory obligations compliance with which would reduce the price of gas. It has so very many features similar to the case at bar, that we cannot refrain from quoting part of the opinion of Lord Macnaghten, who rendered the opinion of the Privy Council:

"There is no dispute as to the circumstances under which the Act of 1887 was passed. The capital of the Company had been increased under the authority of various enactments. It stood at the time at $1,000,000.00. The dividends had reached the statutory limit of ten per cent., and the shares were at a premium. The Gas Company applied to Parliament asking that the capital might be doubled. They proposed that the additional $1,000,000.00 should be allotted to the existing shareholders at par. The corporation of Toronto opposed the bill on the ground that the shareholders were not entitled to so large a bonus. They insisted that advantage should be taken of the opportunity to secure a reduction in the price of gas. Negotiations then took place between the Gas Company and the corporation, and the Act as passed was the result of a compromise.

"It is not necessary to state the provisions of the Act in any detail. Whatever the facts may be, their Lordships assumed for the purposes of this case that the Company has not fulfilled its statutory obligations.

"The Act authorized the Company to increase the capital to a sum not exceeding $2,000,000.00. All new shares were to be sold by auction. All sums received on sales over the par value were to be added to the reserve fund until it equaled one-half of the paid up capital. The reserve fund was not to exceed that limit, and it was to be drawn upon only for certain purposes specified in the Act. Another fund was to be created and maintained by the Company, to be called the 'Plant and Buildings Renewal Fund.' To it were to be charged 'all usual and ordinary renewals and repairs.' The Act then goes on to provide that any surplus of net profit from any source whatever, after the payments therein mentioned and the establishment and maintenance of the reserve fund and the Plant and Buildings Renewal Fund, shall be carried to a special account to be known as the 'Special Surplus Account,' and it declares that 'whenever the amount of such surplus is equal to 5 cents per thousand cubic feet on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year at least 5 cents per thousand cubic feet to all consumers.'

"After these provisions there comes a clause which seems to their Lordships to have an important bearing on the question before them. It is in the following terms:

"'9. The Company shall give not less than two weeks written notice by registered letter to the Mayor of the City of Toronto for the time being of the time of commencing the annual audit of the books and accounts of the Company, and it shall and may be lawful for an auditor to be appointed by the Mayor of the corporation of the City of Toronto, should he deem it advisable to make such appointment, to be present at such annual audit, and for the purpose of verifying the Company's annual statement, to have access at the Company's office to all books, accounts and papers necessary for such purposes.'

"It cannot, of course, be disputed that the Gas Company is under an imperative obligation to create and maintain the several funds specified in the Act of 1887 in accordance with the directions of the enactment. Nor is it open to doubt that the machinery of the Act was designed for the benefit of all the Company's customers. At the same time it is to be observed that no pecuniary penalty is imposed for default, nor is a right of action expressly and in terms given to persons aggrieved. Now it is perfectly true, as was observed by Lord Tenterden, that if a statutory 'obligation is created, but no mode of enforcing its performance is ordained, the Common Law may in general find a mode suited to the particular nature of the case.' *Doe d. Bishop of Rochester vs. Bridges.* But it is equally true that the question whether an individual who is one of a class for whose benefit such an obligation is imposed can enforce performance by an action at law, must depend, to use Lord Cairns' words, 'on the purview of the Legislature in the particular statute and the language which they have there employed.' *Atkinson vs. Newcastle Waterworks Company.* It is especially so, as his Lordship observes, when the Act in question is not an Act of public and general policy, but is rather in the nature of a private legislative bargain, with a body of undertakers incorporated for purposes which Parliament considers of public or general utility.

"We know the history of this legislation. It is difficult to suppose that the Gas Company would wittingly have consented to place themselves at the mercy of every customer who might fancy he was paying more than the Company was entitled to charge. On the other hand, a Chancery suit involving all necessary and proper accounts and inquiries, is at best not a handy mode of obtaining redress for a trifling overcharge in a gas bill. Some people might think the cure worse than the disease. At any rate, it may be doubted whether a remedy which is commonly supposed to be neither expeditious nor economical would have commended itself to Parliament as the best way of protecting ordinary householders and ordinary shopkeepers from the rapacity of a wealthy and powerful company.

"What, then, was the intention of the Legislature? What security was provided to insure observance of the statutory requirements? The answer is to be found in s. 9. The Gas Company was originally established with the assent of the corporation. The corporation were large customers, if not the largest customers, of the Company. The ratepayers, therefore, were interested in keeping down the price of gas. On behalf of their constituents, and on behalf of the public, the corporation came forward to oppose the bill of 1887. They procured the insertion of clauses designed to cheapen the supply of gas. They obtained authority to check the Company's accounts. They were given the fullest power of investigation. If they should find the Company wilfully disobeying the Act of Parliament, they certainly would have no difficulty in compelling obedience by process of law. *To them, and not to every individual customer who may fancy himself aggrieved, Parliament has confided the duty of seeing that the Act is obeyed.*"

In the light of these cases, and in view of the history of the Waterworks legislature, and of the plain and unequivocal provisions of the Act of 1877, we feel that we can confidently assert the validity of our interpretation of Section 15. It was a private legislative bargain and not a public act. It contained special provisions as to how certain conditions of that bargain were to be enforced. It interposed the City Council between the State, the water consumers and the Company. That body is a legislative body. It is elected by the people, and is responsible to them. It is the guardian of the public peace, the public health, and the public welfare of the City of New Orleans. To it is entrusted the whole police power of a great municipality. Is it not reasonable and proper to suppose that it could well be trusted to safeguard the public in the matter of water rates?

In the light of these authorities, let us now also see what the Supreme Court of Louisiana has to say about Section 15. We quote from pamphlet filed by the State, pages 119, 120:

"It is said, however, on behalf of the defendant, that according to the terms of the charter, the only remedy in the case presented is to be found in that provision which authorizes the City of New Orleans to proceed by mandamus to enforce a reduction of charges. We do not so construe the law. Section 15 of the Act of 1877 reads:" (Here the Court quotes the section in full. As it is quoted above, we do not repeat it). "This section of the law is somewhat inartificially drawn, but we are of opinion that a reasonable construction requires that the demand, which the city is to enforce by mandamus, should be held to relate back to the demand which the city had been previously authorized to make, to-wit: the demand for a general reduction in the price of water whenever the profits of the Company exceeded ten per centum per annum. It would be inadmissible to suppose that the individual consumer, who might be the victim of extortion practiced by the Company, was to be left without remedy, and absurd to suppose that his remedy was to consist of the mandamus proceeding which the City of New Orleans was authorized, but not compelled to bring under the conditions stated in the act. Nor does the fact that such consumers might resist overcharge against them, and have actually and successfully done so, affect the rights and obligations of the State."

No authorities are given in support of these statements. No analysis of the law and no appeal to established principles are made to demonstrate them. *Sic volo sic jubeo stet pro ratione voluntas.*

Why should the clause which gives the right to a writ of mandamus, which is attached to the second proviso, be carried back and made applicable to the first proviso only? The second proviso reads, "and provided further, that the

rates charged shall never exceed those now paid by the City, and in case said Company shall refuse compliance, the demand of said City may be enforced by a writ of mandamus." In order to wrench this clause back it is necessary to declare the section "inartificially drawn." What evidence is there that it is inartificially drawn? Would not an examination of the Water Company's books show not only that the profits exceeded ten per cent., but also that the rates were in excess of those then charged by the City? Can it reasonably be said that the public, represented by its legislatively constituted guardian, the City Council, which was given visitatorial power over the Water Company's books, with the right to take full extracts therefrom, had no interest except as individual consumers in the question as to whether the water rates exceeded those formerly charged by the City; that the Council had no power to compel the Water Company to conform its rates to the City rates, and that a writ of mandamus which would lie to compel the Company to comply with one of the provisos on its right to fix charges, would not lie to compel it to comply with the other proviso on that right? We humbly submit that if there is any "inartificialness" in this matter, it lies in the judicial construction and not in the legislative confection of the statute.

The Court says, "it would be inadmissible to suppose that the individual consumer, who might be the victim of extortion practiced by the Company, was to be left without remedy." We grant that proposition to be generally true on the basis of the maxim, *ubi jus ibi remedium*. But in a private legislative bargain concerning a public purpose, the Legislature and the other parties to the bargain have the

right to define and point out the remedy for certain violations of the terms of the bargain; and that is the very claim we make. And the law of such a case is that the remedy as far as it goes is exclusive. But the Court, continuing the sentence quoted above, disposes of this reasoning with the intemperate and, hence, the illogical statement, "and (it is) absurd to suppose that his remedy was to consist of the mandamus proceeding, which the City of New Orleans was authorized but not compelled to bring under the condition stated in the act." We are willing to be charged with absurdity when the proposition we advance is supported by the Judicial Committee of the Privy Council, one of the greatest legal tribunals on earth. See opinion of Lord Macnaghten above quoted.

But let us reason. It is necessary in government that power must be lodged somewhere, and it is recognized that power may be absurd. Judges of last resort decide cases. They may decide them wrong. If they do, is it absurd to say that the unfortunate litigant, victim of such an erroneous decision, has no remedy? We know that he has none. A Legislature has power to say "yea," or to say "nay" on all matters submitted to the legislative discretion. It may say "yea" where it ought in right reason to have said "nay." Is it absurd to say the private victim of the "yea" is without remedy?

Again, it is a presumption *juris et de jure* that a legislative body will do its duty as charged upon it by the law. Was it, therefore, an absurdity for the Louisiana Legislature to suppose, when it charged the City Council with the duty to regulate the water rates of the Waterworks Company within the limitations of the contract, and gave it all

requisite powers to that end, that the Council would shirk its duty? If the Legislature was of opinion that it had provided an efficient remedy for the execution of the contract as written, was it guilty of an absurd action by making that remedy impliedly exclusive? Was it absurd for it to bargain with a quasi-public corporation which was to deal under its grants with tens of thousands of citizens, that the corporation should be free from vexatious contests at the hands of each one of those citizens, and that no one but the representative of all those citizens, chosen and selected by those citizens, should have the right to contest its water rates? Would it be easy to get capital invested in an enterprise where every customer would have his day in court to contest the lawfulness of the charges for the service the invested capital was compelled to give him?

The Court proceeds, "Nor does the fact that such consumers might resist overcharge against them, and have actually and successfully done so, affect the rights and obligations of the State." But suppose that the State has bargained away its rights to contest the water rates and has by mutual consent designated the City Council, the representative of one of the parties to the contract, as the regulator and supervisor of these rates? Is there anything unlawful, or improper, or unusual in such a contract? And if such a contract has been made, ought it not and must it not be enforced? Our case now at this bar is that such a contract was made between the State, the City of New Orleans and the Waterworks Company. If it was made, it was our property and our vested right. All the powers of government in the State of Louisiana, executive, legislative and judicial, have combined to take it away from us, and

the fruit of this combined action is a judgment which denies us this contract, and which by such denial pierces the heart of the defendant with a mortal dart. We complain in this Court that this action of the State not only violates the obligations of our contract, but also takes our property without due process of law.

VII.

The defendant has been deprived of its property without due process of law because its charter has been forfeited on an issue on which it was never impleaded.

This point is based on assignment of errors No. XII (App. pp. vi to viii).

The only averment in the petition of the State as to overcharges in rates is as follows:

"(5). The said Company was, and is prohibited by Sec. 15 of its charter from charging for the use of water supplied by it any more than the rates paid to the City of New Orleans in 1877; the Legislature meaning thereby the rates legally fixed and adopted by the City Council in 1870, which were the only rates legally in force and legally exacted by the City of New Orleans in 1877; and petitioner avers that the said Company has habitually, from 1878 to the present time, illegally exacted and collected greater rates than those legally exacted and collected by the City of New Orleans for same quantities of water supplied, or same facilities and opportunities for drawing water from its pipes."

The Court found as a matter of law and fact that the alleged ordinance of 1870 did not exist and was never the law because never promulgated by the City Council, and that no other ordinance fixing rates existed.

Such finding was the legal end of the case.

But against the objection of the defendant and on the demand of the State, the Court undertook to reconstruct a

system of water rates from the books of the City, which could only have been the rates charged at the will of the executive officers of the City, who had no power to fix rates.

These rates were based on the capacity of the City to deliver water through the allowed openings of the consumer under a head of fifteen feet.

The Court then took the amount of water pumped by the City and the whole amount of money received by the City for water rates to determine the percentage of rate received by the City. In making this calculation no allowance was made for the enormous wastage from the leaky pipes of the City and the maladministration of the officials in charge, all shown in the record.

It then compared these charges with the Waterworks charges made for service through the same openings under a head of sixty feet.

It next took the water pumped by the Waterworks Company through an entirely renovated and repaired system, under vigilant private ownership and inspection, where the leakage and wastage was small, and the whole amount of cash received by the Waterworks Company, to determine the percentage of rate received by the Company.

It thus came to the conclusion that the Company charged more for its water than the City charged.

How much more water can a consumer get through an inch opening in twenty-four hours under a head of sixty feet than he can get in the same time through the same opening under a head of fifteen feet? The answer is nearly four times as much.

How can the percentage of a maladministered and leaky system, where possibly half the water is not paid for, be

compared with the percentage of a tight system, where practically all the water is paid for?

The Court then applied to defendant's tariff the indefinite term, "large consumers," who the Court had decided many years before in the Levy case to be entitled to rate of 15 cents per 1000 gallons. Levy consumed 1,237,500 gallons in eight months, which was at the rate of over 5000 gallons per diem.

It then took up a few individual bills and held that these individual bills were in excess of what it found to have been charged by the City in similar cases.

In this way the Court reached the conclusion that the Water Company exceeded the rates charged by the City in 1877.

When these conclusions were attacked on the rehearing and shown to be groundless, except in one or two exceptional cases, and the basis laid down in the Levy case was, for the sake of argument, taken to be correct, and the tariffs shown to be within the limitation there enforced, the Court said on rehearing:

"If, upon the other hand, we believed that the only fault of the defendant lay in exceptional overcharges, we should be willing to attribute such overcharges to error or accident. But such is not the case. In 1898, the defendant, acting upon the theory that it was bound by no established rates, published a tariff of its own making, in which we find the following:

"For daily average of 100 to 500 gallons, per 1000 gallons, 35 cents.

"For daily average of 500 to 2000 gallons, per 1000 gallons, 30 cents.

"For daily average of 2000 to 4000 gallons, per 1000 gallons, 25 cents.

"For daily average of 4000 to 5000 gallons, per 1000 gallons, 20 cents.

"For daily average of 5000 to 10,000 gallons, per 1000 gallons, 15 cents.

"For consumption above 10,000 gallons daily, special rates.".

From this it will be seen that a person consuming a maximum of 5000 gallons a day, or 1,825,000 gallons per year, was required to pay at the rate of 20 cents per thousand, which was 5 cents in excess of the rate for which it had been held, more than ten years before, that Levy was liable, though there was no appreciable difference in the average daily consumption and the gross amount consumed in the twelve months would be merely 600,000 gallons more than was consumed by Levy, as the latter used the water during only eight months. So, according to the defendant's tariff, a person consuming a maximum of 4000 gallons a day, or 1,460,000 a year, would be charged at the rate of 25 cents per thousand. And yet, we think, within the meaning of the Levy case and the other cases which have been decided against the defendant, and within any reasonable interpretation of the words, that a person who uses 1,460,000 gallons of water a year is a "large consumer." Beyond this, for the purposes of the present application, we have made a further and more critical examination of a number of the books showing the flat rates paid to the City in the years 1876-7 and 1877-8, by small consumers, and we have satisfied ourselves that there was no error in the statement contained in the opinion handed down, that "the flat rates charged to the smaller consumers have been advanced and maintained by the Company in excess of those

exacted by the City during the last year of its administration."

It will thus be seen that the Court moved up the price 5 cents per thousand gallons when the tariff clearly reads that the 4000 gallon consumer pays 20 cents, and not twenty-five, and the 5000 gallon consumer pays 15 cents, and not twenty cents as stated in the opinion. Correctly read and interpreted the whole tariff was within and not without the limitation of the Levy case.

As regards the flat rates we have no statement of any specific rate in any specific case. We simply know what the conclusion of the Court was.

The absolute injustice of applying a penalty to a corporation which destroys its existence upon such an indefinite basis as this is manifest.

Besides, suppose a named butcher shop, or livery stable, was charged $20.00 per annum by the City for water in 1877, taking water through a given opening under a head of fifteen feet. Such a rate was necessarily based upon some calculation that if the opening was kept running so many hours a day, only a given amount of water could be obtained by the consumer. Is that any reason why the Waterworks Company could not increase the charge when it was delivering water through the same opening under a head of sixty feet, and the same method of calculation would show that under the new system the consumer was getting, or could get, if he desired it, four times as much water?

It thus appears that the case was tried and decided in the Supreme Court on a new issue not pleaded: that the water rates of the Company were not compared with the

ordinance of 1870, declared in the petition to be "the only rates legally in force and legally exacted by the City of New Orleans;" that its rates were compared with those fixed in the books of the City by the actual practice of the executive officers of the City under entirely different conditions of pressure and service and that no allowance was made for these different conditions.

What the condition of the City's books were can well be determined from the following extracts from the report, found in this record, of the Administrator of Waterworks for the year ending December 31st, 1877, describing the conditions when he went into office in November, 1876, five months before the Act of 1877 was passed:

"Upon the books of the department there was found nearly one-half of the private hydrants reported closed; but upon making a thorough survey and examination, it was found that very many of those reported closed were open, *and in many instances the parties using the water claimed that, for political service rendered to some one or other, the City had no right to charge them for water, and refused to pay.* Gentlemen who, in the ordinary transactions of life are honest and respectable, were found taking that which did not belong to them, simply because it was the property of the City of New Orleans."

And again he says:

"As there are daily applications at the office for a reduction of water bills, I would respectfully recommend that a carefully studied and revised tariff of water rates be fixed, and that when assessments are made, and the bills made out, no reductions whatever be made except in very exceptional cases."

And again he says:

"It is impossible to keep a correct record of the number of hydrants open and closed, as many persons consider the

waterworks free plunder, and open their own hydrants, regardless of existing laws or regulations."

Imagine the wiping out of a company's charter by the comparison of its rates, adjusted as it believed and as is shown in this record in good faith and in the honest belief that it was inside of its legal rights, with the books of the City kept under the conditions above described in a report by a city official *made nine months after the Legislature had passed the Act of 1877*, which act the Court declared fixed the rights of the Water Company by those books as they stood on March 31st, 1877.

According to the argument of the City, the State and the Court, any political bummer, who for political service had been put on the free list, or who had had his rate adjusted at one-third of the rate that other persons similarly situated were paying, could not be charged for water by the Waterworks Company, or could not have his rate adjusted to the proper scale, without forfeiting its charter.

According to this argument, the Water Company could not charge more money for more water, without forfeiting its charter.

According to this argument, a rate is to bear no real and proper relation to the water furnished or the service rendered, but is a mere arbitrary figure fixed in the City's books of date March 31st, 1877, for the price of water to a particular house, or shop, or stable, or individual.

The rates fixed by the Water Company have given the Company in 20 years an average dividend of 3.71 per cent.

With full access to the Company's books the City Council never complained of these rates or sought to adjust them.

For eighteen years the Mayor and two other high City officials have set on the board of this Company and participated without protest in all adjustments of rates and tariffs.

The public has not complained of these rates except in rare instances.

The City has received and pocketed in this time nearly $300,000.00 in dividends on her stock.

Under these circumstances, to try this Company on charges never made, on issues never pleaded, on instances to be found by groping through the ill-kept and dishonest books of the City, and a comparison of these books with the Company's charges without reference to any fixed rule or principle and without reference to difference in conditions or increase in the amount of water furnished to the consumer, applying the vague term "large consumer," which can be expanded and contracted like an accordeon, and, as a result of such a trial, to wipe out its corporate existence and take away its most valuable asset, its franchises, restoring them to the public in whose behalf the suit is brought, is in our opinion not only a taking of property without due process of law, but is barefaced confiscation.

We, therefore, respectfully submit to your Honors, that federal questions are raised on this record in due form of law, and that such questions are not only not frivolous but that they are sound and well taken, and that they cut up the judgment of the Supreme Court of Louisiana by the roots.

Respectfully submitted,

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